

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Wireless Telecommunications Bureau)
Seeks Comment on MarITEL, Inc. Petition)
For Declaratory Ruling and National)
Telecommunications and Information)
Administration Petition for Rulemaking)
Regarding the use of Maritime VHF)
Channels 87B and 88B)

DA 03-3585
RM 10821

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Office of Secretary

REPLY COMMENTS OF MARITEL, INC.

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SUMMARY

MariTEL, Inc. ("MariTEL") hereby submits the following Reply Comments in response to the initial comments of other parties that addressed the petition for rule making submitted by the National Telecommunications and Information Administration ("NTIA") to the FCC on October 24, 2003 (the "NTIA Petition") and an Emergency Petition for Declaratory Ruling ("Emergency Petition") and Supplement thereto ("Emergency Petition Supplement") submitted by MariTEL on October 15, 2003 and October 27, 2003, respectively (collectively, the "MariTEL Request").

Contrary to the suggestions of other parties, international considerations do not mandate that the FCC designate channels 87B and 88B for Automatic Identification System ("AIS") use. The international designation of channels 87B and 88B for AIS occurred prior to the full consideration and rejection by the Federal Communications Commission ("FCC") of that designation on a domestic basis. The commenting parties do not demonstrate why the FCC should revisit the decisions it already made, the fact that reallocation of the channels is completely inconsistent with MariTEL's rights as an FCC licensee and auction winner, or why whatever needs there may be to designate channels 87B and 88B for AIS could not be accommodated within the framework of current regulations.

MariTEL also disagrees that international actions have forced the FCC's hand to designate channels 87B and 88B for AIS. The FCC has not yet fully considered this issue and is free to take whatever actions are necessary once it does, consistent with law, the public interest, and the rights of existing licensees. Moreover, even international bodies have not yet fully considered the technical characteristics of AIS systems. Therefore, the FCC's decisions may be the bases for international actions, and not vice versa.

The commenting parties also present incorrect information regarding MariTEL. The fact that MariTEL has not yet satisfied its construction obligations cannot be considered as a basis for redesignating MariTEL's channels 87B and 88B for AIS, because MariTEL has not yet been required to meet any construction obligations. In fact, MariTEL's inability to meet those construction obligations are a direct result of the uncertainty created by the United States Coast Guard ("USCG"), which has been unable to firmly establish a course regarding the spectrum needs for AIS.

The commenting parties are also incorrect that the issuance of the two Public Notices that permit the use of channels 87B and 88B by shipborne stations fall within the "military exception" to the Administrative Procedures Act. No such exception exists in this case. Nor are those Public Notices a permitted "logical outgrowth" of prior rule making decisions.

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REPLY COMMENTS OF MARITEL, INC.

MariTEL, Inc., by its attorneys and pursuant to the invitation extended by the Federal Communications Commission ("FCC" or "Commission") in the Public Notice issued on November 7, 2003 ("Public Notice"),^{1/} hereby submits its reply comments responsive to the comments of other parties in the above referenced matter. In this proceeding, the FCC seeks comments on a petition for rule making submitted by the National Telecommunications and Information Administration ("NTIA") to the FCC on October 24, 2003 (the "NTIA Petition") and an Emergency Petition for Declaratory Ruling ("Emergency Petition") and Supplement thereto ("Emergency Petition Supplement") submitted by MariTEL on October 15, 2003 and October 27, 2003, respectively (collectively, the "MariTEL Request").

^{1/} *Wireless Telecommunications Bureau Seeks Comments on MariTEL, Inc. Petition for Declaratory Ruling and National Telecommunications and Information Administration Petition for Rulemaking Regarding the Use of Maritime VHF Channels 87B and 88B, DA 03-3585 (rel. Nov. 7, 2003).*

I. INTRODUCTION

On December 1, 2003, MariTEL submitted comments in this proceeding designed to address the NTIA Petition.^{2/} MariTEL's comments pointed out that the NTIA Petition should not be granted because it failed to demonstrate why the United States Coast Guard's ("USCG's") needs for Automatic Identification System ("AIS") channels could not be met in the manner already specified by the FCC in Section 80.371 of its rules.^{3/} MariTEL asserted that the FCC should order the USCG to re-enter negotiations with MariTEL consistent with that rule.^{4/} MariTEL also noted that if the FCC adopts NTIA's Petition, it would establish a dangerous precedent that would allow the FCC to change the rules affecting the value of auctioned spectrum after licenses are issued.^{5/} MariTEL also demonstrated that reallocation of channels 87B and 88B constitutes an unconstitutional taking of MariTEL's spectrum assets (not limited only to channels 87 and 88, because of interference to MariTEL's other channels) for which the FCC must compensate MariTEL.^{6/} MariTEL pointed out that before the FCC can adopt the NTIA Petition, it must address many open questions regarding the "shared" use of channels 87B and 88B.^{7/} Finally, MariTEL suggested a means by which it could remain the licensee of channels 87B and 88B and allow the USCG to meet its requirement to use those channels for

^{2/} *Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Petition For Declaratory Ruling and National Telecommunications and Information Administration Petition for Rulemaking Regarding the Use of Maritime VHF Channels 87B and 88B, DA 03-3585 and RM 10821, Comments of MariTEL, Inc. (filed Dec. 1, 2003) ("Comments of MariTEL").*

^{3/} Comments of MariTEL at 12.

^{4/} Comments of MariTEL at 13, 19-22.

^{5/} Comments of MariTEL at 13-14.

^{6/} Comments of MariTEL at 14-16.

^{7/} Comments of MariTEL at 17-20.

AIS In particular, MariTEL recommended that the FCC designate it as the recognized frequency coordinator for channels 87B and 88B.^{8/}

Seven other parties submitted comments in this proceeding.^{9/} Those other parties largely supported the need to ensure that channels 87B and 88B are available for AIS operations. Several comments suggested that MariTEL's lack of commercial operation to date should influence the FCC's decision in this proceeding.^{10/} Accordingly, MariTEL is pleased to have the opportunity to submit the following Reply Comments.

II. DISCUSSION

A. The International Allocation of Channels 87B and 88B

Many parties argue that because channels 87B and 88B have been designated on an international basis for AIS, the FCC should now reallocate those channels for AIS in the United

^{8/} Comments of MariTEL at 22-23.

^{9/} Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Petition For Declaratory Ruling and National Telecommunications and Information Administration Petition for Rulemaking Regarding the use of Maritime VHF Channels 87B and 88B, DA 03-3585 and RM 10821, Comments of Fred W. Pot (filed Nov. 17, 2003) ("Pot"); Comments of Lockheed Martin Corporation (filed Dec. 1, 2003) ("Lockheed"); Comments of The Boat US Association of The United States (filed Dec. 1, 2003) ("Boat US"); Comments of the Radio Technical Commission for Maritime Services (filed Dec. 1, 2003) ("RTCM"); Comments of the Saint Lawrence Seaway Management Corporation (filed Dec. 1, 2003) ("SLSMC"); Comments of the National Marine Electronics Association (filed Dec. 1, 2003) ("NMEA"); Comments of Nauticast Schiffsnavigationssysteme, AG (filed Dec. 1, 2003) ("Nauticast"). One party, ShipCom, LLC, has already filed reply comments in this proceeding and, where relevant, its comments are referenced herein. *See also* Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Petition For Declaratory Ruling and National Telecommunications and Information Administration Petition for Rulemaking Regarding the use of Maritime VHF Channels 87B and 88B, DA 03-3585 and RM 10821, Reply Comments of ShipCom, LLC (filed Dec. 5, 2003) ("ShipCom").

^{10/} Comments of RTCM at 2-3; Comments of Pot at 2; Comments of Nauticast at 8-9; *but see* Comments of ShipCom at 1.

States, stripping MariTEL of the rights it obtained in Auction 20.^{11/} MariTEL recognizes the valuable function that AIS serves both for collision avoidance as well as for marine domain awareness.^{12/} MariTEL also recognizes the cost and operational advantages in having channels 87B and 88B designated for AIS operations domestically as well as internationally, so that international traffic need not be switched when vessels approach or enter United States waters.^{13/}

This recognition notwithstanding, none of the parties supporting the NTIA Petition demonstrate why the FCC should abandon the decisions and rules it adopted in the *Third Report*

^{11/} Comments of Nauticast at 3, 9-10; Comments of NMEA at 1; Comments of Pot at 2, Comments of Boat US at 1; Comments of Lockheed at 4-5; Comments of SLSMC at 2; Comments of RTCM at 2, 3.

^{12/} Nauticast argues that the expansion of the USCG's mission to include marine domain awareness somehow allows the FCC to ignore the requirements of the Administrative Procedure Act ("APA"). Comments of Nauticast at 9-11. As discussed further below, the "military exception" to the APA does not apply to the FCC's action issuing the June 2002 Public Notices challenged in MariTEL's Request. MariTEL is aware of no other exception to the APA that would permit the FCC to change the rules adopted in its *Third Report and Order* in Docket No. 92-257 to be reversed without adherence to APA requirements, as Nauticast suggests. See *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998) ("Third Report and Order"). Therefore, while the tragic events of September 11, 2001 may have modified the USCG's needs to use channels 87 and 88, they have not modified the APA. Nauticast also erroneously states that "there are no other frequencies available in the Marine Band that are not already controlled by MariTEL." Comments of Nauticast at 9-10. As the Commission is aware, MariTEL is licensed domestically for only a fraction of the channels that are allocated internationally for mobile maritime operations. Some of the channels that are allocated internationally for this purpose are designated for Federal government operations, while other channels are allocated for use under Parts 90 (for railroad and public safety use) and 74 (for studio to transmitter links) of the FCC's rules.

^{13/} None of the commenting parties address the fact that switching of traffic to alternative AIS frequencies is specifically contemplated by AIS standard ITU-R 1371-1 and recognized as a viable option by competent authorities around the world. See *Commission Decision on the Application of Article 3(3)(e) of Directive 199/5/EC of the European Parliament and of the Council to Radio Equipment Intended to be Used on Non-Solas Vessels and Which is Intended To Participate in the Automatic Identification System (AIS)*, 03/808, art. 3(3)(e), 2003 O.J. (L 81/46) 1. In fact, the USCG continues to state that switching mariners from channels 87B and 88B to alternate AIS channels can safely be done. "Automatic Identification System; Vessel Carriage Requirement," 68 Fed. Reg. 60559, 60563 (2003).

and Order. As many commenting parties pointed out, channels 87B and 88B were designated on an international basis for AIS purposes in 1997,^{14/} well before the *Third Report and Order*, well before the FCC's auction of these channels, and certainly well before the Memorandum of Agreement ("MOA") between MariTEL and the USCG was executed. None of these commenting parties provide any reason why a 1997 international action, fully considered by the FCC, should now cause the FCC to reverse its earlier decision. As MariTEL pointed out in its comments, the FCC already fully addressed and rejected the proposal to designate channel 87 for AIS purposes.^{15/} Moreover, even if there is a reason for the FCC to revisit its decision not to designate channels 87B and 88B for AIS, the commenting parties have not demonstrated why the existing procedures specified in Section 80.371 could not be employed to satisfy the USCG's requirements.^{16/} As MariTEL demonstrated in its comments, the USCG's needs can be accommodated within the context of the FCC's rules.^{17/} MariTEL also suggested that, by becoming the frequency coordinator of the use of channels 87B and 88B, mariners and the USCG could employ these channels.^{18/} Therefore, the concerns of commenting parties regarding the availability of channels 87B and 88B to the USCG can be addressed without reallocating those channels from MariTEL.

^{14/} See, e.g., Comments of Nauticast at 3, Comments of NMEA at 1; Comments of Pot at 1.

^{15/} Comments of MariTEL at 10-12; Reply Comments of ShipCom at 2.

^{16/} Reply Comments of ShipCom at 4.

^{17/} Comments of MariTEL at 10-12.

^{18/} Comments of MariTEL at 22-23; MariTEL notes that the FCC issued a separate Public Notice seeking comments and reply comments in response to MariTEL's proposal to act as the frequency coordinator for channels 87 and 88. See "Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Proposal to Serve as Automatic Identification System (AIS) Frequency Coordinator," DA 03-3669, *Public Notice* (rel. November 19, 2003). In the interest of administrative efficiency, MariTEL will address matters related to this proposal, including the cost to mariners and the effect on full implementation of AIS, in the context of that proceeding.

Those parties that advocate reallocation of channels 87B and 88B also fail to address the fact that such an action would constitute a taking under the Fifth Amendment of the United States Constitution.^{19/} None of the commenting parties suggest the compensation that MariTEL should receive based on such a taking.^{20/} Even if the action did not constitute a taking, it would represent the first time that the FCC reallocated spectrum from a winner of an FCC auction. Such an unprecedented action would have a chilling effect on all future FCC auctions.

Therefore, even assuming the validity of the USCG's needs to dedicate channels 87B and 88B for AIS purposes, the commenting parties have not demonstrated why or how, consistent with past FCC decisions and MariTEL's rights, those channels can be made available for AIS in the manner described by the NTIA Petition.

^{19/} As MariTEL pointed out in its comments, reallocation of channels 87B and 88B would constitute a taking of not only these channels, but of others that would be subject to harmful interference by simplex AIS use of these coast station frequencies. Comments of MariTEL at 15-17; *see also* Reply Comments of ShipCom at 5. The RTCM comments that minimize the AIS to VPC interference contain no formal technical analysis. Comments of RTCM at 3. The report prepared by inCode, associated with MariTEL's comments, demonstrate such interference.

^{20/} Fred Pot suggests two methods by which MariTEL might be compensated for Commission taking of its frequencies. First, Pot states that the FCC could "offer MariTEL another marine mobile band to replace AIS1, if one can be made available" (Pot also states that the FCC should "revoke" MariTEL's license, but MariTEL assumes that Pot refers only to MariTEL's authorization for channels 87B and 88B, and not MariTEL's authorizations in general). Comments of Pot at 3. Pot's first suggestion is problematic for at least three reasons. First, as MariTEL pointed out in its comments, USCG use of channels 87B and 88B will affect many adjacent channels. Therefore, the FCC would be required to provide MariTEL with many other channels to address the USCG's for channels 87B and 88B. Comments of MariTEL at 15-16. Second, by securing the rights to use channels 87B and 88B, MariTEL anticipated participating in the AIS industry, and that opportunity that would be taken from MariTEL by any reallocation. Finally, it is the NTIA's obligation, which it has not fulfilled, to identify potential replacement spectrum for MariTEL. Comments of Pot at 3. MariTEL cannot meaningfully respond to any proposal that it be compensated by licensing alternative channels until those alternative channels are identified. Pot also suggests that the FCC "buy back" spectrum from MariTEL. MariTEL does not oppose this proposal, but expects to be compensated at current market levels, based on other uses of similar spectrum, and expects to recover its costs for purchase and development of the spectrum and related technology to date.

Finally, Nauticast and other commenting parties suggest that because channels 87B and 88B have been designated in other countries for AIS use, the FCC has no choice but to designate those channels domestically for AIS operations.^{21/} MariTEL disagrees with this premise. The FCC is not compelled to follow frequency allocation or equipment specifications by International standards bodies if United States spectrum policy dictates otherwise.^{22/} The FCC may propose to amend its regulations to conform to international spectrum policy when United States interests so demand. The only decisions the FCC has made regarding the use of channels 87B and 88B is to dedicate them for commercial operations, by including them in Auction 20. To the contrary, there are a host of issues that the FCC is now considering and must resolve before it can effectively decide whether channels 87B and 88B can be used for AIS operations.^{23/} As MariTEL has pointed out, the FCC has not adopted final rules governing the technical characteristics of AIS shipborne transmitters (and MariTEL has demonstrated that the interim standards the FCC has used are ineffective to prevent harmful interference to FCC licensed spectrum). It is contrary to public policy and United States sovereignty to suggest that the decisions that the FCC has not yet made are dictated by others.

^{21/} Comments of Nauticast at 3, 9-10, Comments of NMEA at 1, Comments of Pot at 2, Comments of Boat US at 1; Comments of Lockheed at 4-5; Comments of SLSCMC at 2; Comments of RTCM at 2, 3. It is notable that many of those who assert that the FCC has no choice but to designate channels 87B and 88B for AIS use are companies who have made investments in AIS products based on the FCC's interim decisions and wish to profit from their investments. The motivation for these comments are obvious and self-serving and hence, should be rejected by the FCC. If the FCC considers the equity of investors, it must consider the thousands of investors in MariTEL, whose investment is being destroyed by the uncertainty created by the USCG's inability to address the spectrum requirements for AIS.

^{22/} Indeed, as noted above, (*supra*, note 2), the FCC declined to make internationally recognized maritime mobile channels available for maritime operations domestically.

^{23/} See, e.g., *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Fourth Further Notice of Proposed Rulemaking*, 17 FCC Rcd 227 (2001) ("Fourth Further Notice").

Moreover, in addition to “Class A” shipborne AIS devices currently being used^{24/}, international standards bodies are still developing “Class B” shipborne device^{25/} standards, Aids-to-Navigation (ATONs) standards, base station standards, and other equipment standards. These future AIS devices, along with future versions of Class A devices, are expected to cause much less interference because international standards bodies are now aware (based in part on MariTEL’s efforts and contributions from other countries who have already deployed an operational AIS network) of the problems in the initial AIS standards. Without final consideration of these matters, it is unreasonable to suggest that the FCC’s AIS path is already dictated. A final rulemaking on AIS licensing, equipment certification, and frequency coordination requirements for AIS in the United States is not too late. To the contrary, it is in the best interest of the international community and standards bodies to insure that future AIS equipment specifications are consistent with FCC requirements, rather than the other way around. Therefore, the FCC should expeditiously proceed with its consideration of these issues so that international bodies can best accommodate United States spectrum policy.^{26/}

^{24/} Class A devices are those required by the International Maritime Organization (“IMO”) to be carried by vessels subject to the Safety of Life at Sea (“SOLAS”) convention, with technical characteristics developed by the International Electrotechnical Commission (“IEC”). See “The American Practical Navigator,” *National Geospatial Intelligence Agency*, Chapter 27 at 390, available at <http://pollux.nss.nima.mil/pubs/pubs_j_apn_sections.html?rid=187>.

^{25/} Class B devices are those that are expected to be employed by non-SOLAS vessels. *Id.*

^{26/} Similarly, Boat US states that it supports the USCG’s position because channels 87B and 88B are, according to Boat US, “the last available internationally-interoperable and recreational-vessel interoperable VHF spectrum in the United States.” Comments of Boat US at 1. Boat US is, of course, incorrect. Other channels for which MariTEL is licensed (besides channels 87B and 88B) are available for maritime traffic. Moreover, as MariTEL has pointed out in other fora, the FCC should not continue to require that marine traffic be carried on frequencies for which there is no maritime demand. Finally, MariTEL believes it ironic that Boat US expresses concern about the availability of channels 87B and 88B for maritime traffic, but does not seem concerned that AIS operations on those channels will destroy the potential use of other channels designated for maritime operations.

B. Information Regarding MariTEL

Several commenting parties include false information regarding MariTEL in support of their contention that the FCC should feel free to strip MariTEL of its rights as an FCC licensee.^{27/} Even if they were true, they would not constitute justification to undertake the action proposed.

RTCM states that “MariTEL’s VHF Public Coast (VPC) service has not been successful. Build-out has not been completed on schedule, and MariTEL has voluntarily terminated VPC operations, so MariTEL has no current commercial operations on Channel 87B to protect.”^{28/} As an initial matter, RTCM is factually incorrect regarding MariTEL’s construction obligations. The FCC’s rules require MariTEL to meet an initial construction obligation by May, 2004^{29/} Therefore, it is inaccurate for RTCM to suggest that MariTEL has not completed its obligations on schedule – MariTEL had no obligations until May, 2004. Moreover, the FCC recently extended MariTEL’s initial construction obligation to May, 2006.^{30/} Importantly, the reason that MariTEL has been unable to proceed with the commercial implementation of its service is due principally to the uncertainty regarding the availability of its spectrum. Had the USCG been

^{27/} See, e.g., Comments of Pot at 3; Comments of Nauticast at 8-9; Comments of RTCM at 2-3; *but see* Reply Comments of ShipCom at 1.

^{28/} Comments of RTCM at 2-3.

^{29/} 47 C.F.R. § 80.371.

^{30/} *MariTEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Stations Geographic Area Licenses*, DA-03-3614, *Order* (rel. December 4, 2003). Pot also suggests that because of the former 2004 construction deadline, the FCC has the option to wait until that time to address the issues raised in the Public Notice because MariTEL will likely miss that the construction obligation due to “current financial difficulties.” Comments of Pot at 3. Although this suggestion is no longer relevant because MariTEL’s construction obligations have been extended to 2006, MariTEL takes this opportunity to point out that it has no “financial difficulties.” It remains prepared to construct facilities, as described in its request for extension of its construction deadline as soon as the FCC resolves the issues regarding the spectrum available to it.

willing to engage MariTEL in the type of meaningful negotiations contemplated by Section 80.371 of the FCC's rules and a resolution of this matter been reached, MariTEL would have begun providing commercial service long ago.

RTCM's suggestion that channels 87B and 88B may be reallocated because MariTEL has not yet completed construction and operation of its facilities is similarly flawed.^{31/} Public policy dictates that the FCC not take actions detrimental to a licensee merely because the licensee is not yet obligated to construct its facilities. There are many FCC licenses that have been issued by auction, the facilities for which have generally not yet been built (the Wireless Communications Service and the 39 GHz service are only two examples). It would be contrary to the public interest, and destroy investment in the telecommunications industry if the lack of construction were a basis for the FCC to take action that impedes a licensee's future ability to operate.

RTCM also states that MariTEL has no rights to AIS frequencies (which MariTEL interprets as channels 87B and 88B) if it fails to agree with the USCG regarding channels that should be made available for USCG use pursuant to section 80.371 of the FCC's rules.^{32/} RTCM misunderstands the FCC's rules and decisions. Channels 87B and 88B are licensed to MariTEL pursuant to the FCC's Auction 20. The USCG may secure use of up to two narrowband offset channels pursuant to the *Third Report and Order* and Section 80.371 of the FCC's rules.^{33/} If the

^{31/} Comments of RTCM at 2-3. Nauticast similarly argues that MariTEL has no standing to request that the FCC terminate its permission for shipborne AIS stations to operate on channels 87B and 88B because there is no actual interference to MariTEL's operations. Comments of Nauticast at 7-9. As MariTEL demonstrated in its comments in this proceeding, the interference it will suffer with the proliferation of devices using channels 87B and 88B is severe. Comments of MariTEL at 15-17. MariTEL cannot effectively operate today because of the operation of these channels by shipborne vessels and the USCG. Therefore, MariTEL has a direct interest in the use of channels 87B and 88B, even if it is not operating today.

^{32/} Comments of RTCM at 3.

^{33/} 47 C.F.R. § 80.371, Reply Comments of ShipCom at 2.

USCG and MariTEL are unable to agree on the narrowband offset channels to be dedicated for USCG use, the USCG may petition the FCC for the use of two narrowband channels. The FCC's rules do not state or infer that upon failure of MariTEL and the USCG to negotiate an acceptable agreement, channels 87B and/or 88B become available to the USCG. Accordingly, MariTEL remains the licensee of these channels, despite the failure of the USCG and MariTEL to reach an agreement regarding the implementation of Section 80.371 of the FCC's rules.^{34/}

C. Procedural Matters

Nauticast argues that the issuance of the June 2002 Public Notices was permissible under the "military" exemption of the APA.^{35/} Nauticast is incorrect. Section 553(a) of the APA excepts from its rulemaking requirements rules relating to the military or foreign affairs functions of the United States.^{36/} The Commission has clarified that it can take action without notice and comment procedures.^{37/} Nevertheless, in all of the cases in which the FCC employed this exception, it explained why it thought it was appropriate to take the action and explained the rule change.^{38/} Thus, although this exception is available to the FCC, it must still explain the

^{34/} Pot suggests that MariTEL "backed out" of the MOA with the USCG, causing the USCG to be without access to channel 87B. Comments of Pot at 2. Pot is incorrect. MariTEL terminated the MOA, as was its rights pursuant to provisions of the MOA requested by the USCG, because of the USCG's violation of the terms of the MOA.

^{35/} Comments of Nauticast at 12.

^{36/} 5 U.S.C. § 553(a).

^{37/} *Id.*

^{38/} *Amendment of Part 2 of the Commission's Rules to Allocate the Band 33-36 GHz to the Fixed-Satellite Service for Federal Government Use, Memorandum Opinion and Order*, 16 FCC Rcd 2799 ¶¶ 5-6 (2001); *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz to the 24 GHz Band for Fixed Service, Memorandum Opinion and Order*, 13 FCC Rcd 15147 ¶¶ 23-40 (1998); *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, Fifth Report and Order*, 17 FCC Rcd 14999 ¶ 29 (2002); *Amendment of Part 2 of the Commission's Rules to Allocate the*

change made, why the action meets the exception, and how the rule was changed. The FCC failed to do so in this case.

Nauticast is similarly incorrect in its assertion that the June 2002 Public Notices were “logical outgrowths” of other FCC decisions. The logical outgrowth test is an evaluation of whether a final rule is a logical outgrowth of the rule proposed in the original notice or rulemaking proposal.^{39/} If the rule is a logical outgrowth of the notice, then an agency is not required to engage in a new round of comments on this issue. To evaluate whether the new rule is a logical outgrowth of the proposed rule, courts will look at “whether . . . [the party] should have anticipated that such a requirement might be imposed.”^{40/}

In this case, the 2002 Public Notices cannot be considered a “logical outgrowth” of the *Fourth Further Notice* for several reasons. First, the logical outgrowth exception applies to final rules.^{41/} In this case, the Public Notice was not a final rule because the FCC did not indicate that it was the final resolution of the *Fourth Further Notice*. To the contrary, the June 2002 Public Notices made it clear that the position adopted by the FCC was an interim position – at best –

Band 33-36 GHz to the Fixed-Satellite Service for Federal Government Use, Memorandum Opinion and Order, 16 FCC Rcd 2799 ¶ 6 (1991).

^{39/} *American Medical Association v. United States*, 887 F.2d 760 (7th Cir. 1989); *Aeronautical Radio, Inc. v. FCC*, 928 U.S. 428, 445-46 (D.C. Cir. 1991); *Amendment of Parts 2, 15, and 97 of the Commission’s Rules to Permit the Use of Radio Frequencies Above 40 GHz for New Radio Applications, Memorandum Opinion and Order on Reconsideration and Notice of Propose Rulemaking*, 13 FCC Rcd 16947 ¶ 48 nn.80-82 (1998).

^{40/} *Aeronautical Radio, Inc. v. FCC*, 928 U.S. 428, 445-46 (D.C. Cir. 1991); *Amendment of Parts 2, 15, and 97 of the Commission’s Rules to Permit the Use of Radio Frequencies Above 40 GHz for New Radio Applications, Memorandum Opinion and Order on Reconsideration and Notice of Propose Rulemaking*, 13 FCC Rcd 16947 ¶ 48 n.80 (1998); *Amendment of Part 22 of the Commission’s Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, Further Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 2109 ¶ 13 (1996).

^{41/} *Nat’l Elec Mfrs Ass’n v. EPA*, 321 U.S. App. D.C. 319 (D.C. Cir. 1996); *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075 (D.C. Cir. 2003).

until the FCC could resolve the issues associated with the use of shipborne AIS equipment in its pending rulemaking.^{42/} Thus, this is not the final resolution of the proposal referenced in the *Fourth Final Notice* and as the Public Notice makes clear, it cannot be considered a final rule

The courts and the FCC also have clarified that the notice must contain a description of the “subjects and issues involved [such that it] affords interested parties a reasonable opportunity to participate in the rulemaking.”^{43/} The courts are reluctant to determine that something is a logical outgrowth of a proposed rule when a party was not afforded adequate notice upon which to formulate a response.^{44/} For example, the Fourth Circuit has held that when a rulemaking proposal did not afford parties with enough information to comment on an issue, the agency was required to issue a new notice of proposed rulemaking^{45/} In this case, the *Fourth Further Notice* raised for the first time the technical requirements applicable to shipborne AIS transmitters. This

^{42/} Public Notice at 1-2. Nauticast complains that the FCC should not now take action that would affect the investments that it made on the strength of the June 2002 Public Notices. Comments of Nauticast at 11-12. MariTEL was under no obligation to object to equipment approvals issued under these interim procedures and cannot be estopped from pursuing this matter because of Nauticast’s business decisions to proceed under interim measures. Nauticast must bear the burden of those business decisions. A plain reading of the June 2002 Public Notices made it clear that technical criteria for approval of AIS shipborne transmitters was still under consideration in the *Fourth Further Notice*. Nauticast took what it believed to be a reasonable business risk and cannot now complain that the risk should be shifted to MariTEL.

^{43/} *Amendment of Parts 2, 15, and 97 of the Commission’s Rules to Permit the Use of Radio Frequencies Above 40 GHz for New Radio Applications, Memorandum Opinion and Order on Reconsideration and Notice of Propose Rulemaking*, 13 FCC Rcd 16947 ¶ 48 n.82 (1998); *Transpacific Freight Conference of Japan v. Federal Maritime Commission*, 650 F.2d 1235, 1248 (D.C. Cir. 1980).

^{44/} *Chocolate Manufacturers Ass’n v. Block*, 755 F.2d 1098, 1106-07 (4th Cir. 1985).

^{45/} *Id*; *Ober v. EPA*, 84 F.3d 304, 315 (9th Cir. 1996) (invalidating EPA rule where it deviated from proposal); *Environmental Defense Center, Inc. v Natural Resources Defense Council*, 344 F.3d 832, 877-78 (9th Cir. 2003) (“according to the logical outgrowth standard, a final regulation must be in character with the original proposal and a logical outgrowth of the notice and comments.”)

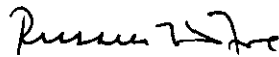
was not an issue on which the FCC solicited comments in another, already concluded phase, of that proceeding. Thus, the logical outgrowth test does not apply in this case.

III. CONCLUSION

MariTEL, Inc. hereby submits the foregoing Reply Comments and asks that the FCC grant the MariTEL Request, deny the NTIA Petition, and take other actions consistent with the views expressed herein.

Respectfully submitted,

MariTEL, Inc.



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December 11, 2003

CERTIFICATE OF SERVICE

I, Susan F. Duarte, do hereby certify that on this 11th day of December, 2003, the foregoing Comments were served on the following persons by first class mail, postage prepaid, except as indicated below:

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